3547

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

THE WASHINGTON WATER POWER COMPANY, a Corporation,

Appellant,

vs.

SHOSHONE COUNTY, a municipal corporation; JOHN F. FERGUSON, as treasurer and ex-officio tax collector of Shoshone County, Idaho; and HARRY A. ROGERS, clerk of the District Court and ex-officio auditor and recorder of Shoshone County, Idaho; and JOHN F. FERGUSON and HARRY A. ROGERS, individuals,

Appellees.

Appellees' Brief

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Attorneys for Appellees.

THE WALLACE MINER, WALLACE IDAHO

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STATEMENT OF THE CASE.

The appellant brought suit to have declared void certain taxes levied against its property in Shoshone

County, Idaho, during the year 1918. Its total tax for that year in said county, exclusive of penalties, was $7667.08, of which it admitted 55 per cent, or $4216.89 to be valid, and it sought to enjoin the collection of the balance.

The grounds upon which appellant sought this relief may be summarized as follows:

It is asserted in its bill of complaint that in the year 1918 appellant's property in Idaho was assessed for more than 100 per cent of its full cash value; that is, that it was assessed for $2,750,000.00, whereas its real value did not exceed $2,438,978.00. It further alleged that throughout the State of Idaho, and particularly in Shoshone County, property other than that of appellant, was systematically and intentionally assessed at less than 50 per cent of the full cash value thereof, and that such other property exceeded 75 per cent of all the property in the State and in Shoshone County.

This suit was consolidated for trial with a suit against Kootenai County, Idaho, in which the issues were quite similar.

The decision of the trial Judge was that the taxes demanded of appellant in Shoshone County were not in excess of its just share of the entire burden of taxation; that while some property in said county, the amount thereof being uncertain but considerably less than one-fourth of all the property in said county, had been assessed at 50 per cent of its value, the great bulk of the property in said county had been assessed at

from 75 per cent to 100 per cent, or more, of its real value, and that appellant's property had, in fact, been assessed for only 75 per cent of its value. The appellant was, therefore, denied any relief, and its complaint was ordered dismissed. (Tr. pp. 72-74).

This abridged statement suggests the following questions for discussion in this brief:

1. Upon what basis or proportion of its real value was the property of appellant assessed?

2. Upon what basis or proportion of its real value was other property in Shoshone County assessed?

3. And if other property throughout the State, but not in Shoshone County, was systematically assessed at a less proportion of its real value than was appellant's, in what manner did such undervaluation of property in other parts of the State, affect appellant in Shoshone County?

And the answers which we shall give to these questions, and endeavor to support in this brief, are:

1. The property of appellant was assessed at not exceeding 75 per cent of its full cash value.

2. That fully three-fourths of all other property in Shoshone County was assessed at from 75 per cent to 100 per cent, or more, of its real value, and that the remaining one-fourth was assessed at from 50 per cent to 100 per cent, or more, of its value; it being impossible from the record to determine what amount of this one-fourth was assessed at 50 per cent, what amount at 100 per cent, and what amount at percentages between 50

per cent and 100 per cent.

3. If the answers to the first and second questions are correct, and it then be assumed that in other counties of the State than Shoshone, property was generally assessed at only 50 per cent of its value, this undervaluation would affect appellant's taxes only insofar as the State tax was concerned (about one-sixth of its total tax in Shoshone County), but would not affect the amount of appellant's taxes which were local to Shoshone County, such as the county, school and road district taxes.

These questions will be discussed in their order, and further reference made to the facts where thought necessary in the course of the argument.

ARGUMENT.

Appellant's property in Idaho was assessed in the year 1918 *at not exceeding* 75 *per cent of its full cash value.*

The trial Judge in his decision in the Kootenai County case determined the value of appellant's property in Idaho, for the year 1918, to be $3,620,500.00, and its assessment at $2.750,000.00 as indicative of an effort on the part of the State Board of Equalization to assess such property upon the basis of approximately 75 per cent of such value. (Tr. pp. 61-62). Upon this issue, such is also the Court's decision in the Shoshone County case.

In arriving at these figures, the trial court followed the Joint Findings of the Public Utilities Commissions of the States of Idaho and Washington. (Ex. 15, Bk. of Exhibits, p. 227).

The first reference found to such findings in the present case is in paragraph X of appellant's complaint (Tr. p. 13), where it is alleged that in August, 1918, the appellant caused its attorney and auditor to attend the meeting of the State Board of Equalization at Boise, Idaho, "in relation to the assessment of the property" of appellant. That at such meeting appellant's counsel "presented to and asked the consideration by" said Board of the "decision and judgment" of such Public Utilities Commissions in such case "wherein the said commission had * * * made and entered its judgment and opinion valuing the property of the Washington Water Power Company in the State of Idaho after an investigation by officers and engineers of the said Commission and the taking of testimony and the investigation of the cost of reproduction and other facts *essential to an understanding of the value of the said property.*" The complaint then alleges that this valuation of appellant's property by such commissions was made as of December 31, 1917, and that there was no change in the value thereof between said last mentioned date and the second Monday of January, 1918, on which latter date the property was assessed. It is further alleged that the suit in which the aforesaid findings were made "was brought for the purpose

among other things of having determined and fixed the value of the property" of appellant and that such judgment and decision "was rendered only after an appraisement" of appellant's property.

The fact was, then, that at the time when the State Board of Equalization was about to assess appellant's property, and after appellant had filed the only report required by law to be filed by it, such appellant voluntarily appeared before said Board and made an additional showing, not required by law; that it brought to the attention of the Board the judgment and decision of another commission of the State of Idaho, wherein the value of appellant's property had been in issue, and had been determined, and that it, impliedly at least, expressed a willingness to have its property assessed at the valuation fixed by such decision. Nor does the complaint assert any distinction between the valuation made by the Utility Commission as being one for rate-making purposes only; this distinction was not mentioned until the trial of the present case. The State Board was interested only in the value of appellant's property for purposes of taxation, and had nothing to do with the question of fixing rates. If, then, the findings and decision of the Public Utilities Commission determined the value of such property for rate-making purposes only, why should such decision have been called to the attention of the State Board? The fact was, that appellant was willing, at that time, to be assessed in accordance with the valuation of its property as fixed by

the decision of the Public Utilities Commission, and that was its purpose in calling the attention of the State Board of Equalization to such decision. And the trial Court so found:

> "It is pointed out that plaintiff brought the findings to the attention of the Board of Equalization while it had the assessment under consideration, and thus impliedly requested it to accept the conclusions embodied therein. While, therefore, we are without direct evidence of the mental operation of the Board, we have a case where at the time when it was about to take action one of the parties represented that it should follow the determination of the commission, and where the other party now insists that such determination is correct, and hence impliedly concedes that the Board of Equalization should have accepted and did accept it. In view of these conditions and the further fact that the findings referred to were made by a body invested with the necessary jurisdiction, after an extended hearing in a proceeding the parties to which were the State * * * and the defendant, we may reasonably conclude not only that such findings are correct, but that the Board of Equalization, which appears to have made no independent investigation, accepted them as the basis of the assessment."

And we contend that no other conclusion was open to the trial Court. Unless the appellant, in presenting the findings of the Public Utilities Commission to the State Board of Equalization, desired to be assessed upon the valuation found by such Commission (or a percentage

of such valuation), then the presentation of such findings was without purpose. The Public Utilities Commission of the State of Idaho had, at great expense (declared by appellant's counsel to approximate $2000.00 per million of value, brief p. 32) determined the value of appellant's property, and presented the findings of such Commission to the State Board with the implied suggestion that that Board, without independent investigation, should accept such findings.

If our position upon this question be correct, it is then of little importance that upon the trial of this action the appellant attempted to prove a value different from that found by the Public Utilities Commission, or to place a different construction upon the findings of such Commission. For certainly a taxpayer who represents to the taxing officials, whether it be the assessor, or the County or State Board of Equalization, that the value of his property is a certain sum, which valuation is adopted by such assessing official, can not thereafter obtain relief even though he does assert and prove a different valuation. He is bound by the valuation as represented to the taxing official.

But what, then, was the value of appellant's property as determined by the findings of the Public Utilities Commission? The Joint Commissions of the States of Idaho and Washington determined that the "value of all the property of the Washington Water Power Company, both tangible and intangible, used and useful in the business of furnishing electric energy to the citizens

of the State of Washington and to the citizens of the State of Idaho, on the 31st day of December, 1917, is the sum of $20,500,000.00"(Bk. of Exhibits, p. 268). The Commissions then apportioned this value according to six different theories, the first apportionment being "in accordance with the value of the physical properties located in each state" (Bk. of Ex. p. 269), and on this theory finds the value of appellant's property in Idaho to be $3,587,500.00 (Bk. of Ex. p. 270). This valuation was placed upon the very property which the State Board of Equalization was attempting in 1918 to assess, viz.: the physical properties of appellant located in Idaho. And we contend that this was the only one of the six theories of apportioning the valuation of appellant's properties between the two states, which could properly have been adopted by the State Board, and that these findings, having been presented to said Board by appellant, that the latter is bound by the valuation founded upon such findings. Admittedly, the above figures did not include the value of the appellant's property in St. Maries, which it alleges in its complaint to be $31,461.00, and which the trial Court found to be about $33,000.00 (Tr. p. 17; p. 61). And with these figures presented to it, the State Board assessed appellant's property at $2,750,000.00 or between 70 and 75 per cent of such value.

Our contention, then, is briefly this: That the appellant having presented these findings to the assessing board, and impliedly, at least, expressed a willingness

to be assessed at the value therein found, but at the same percentage of such value as other property, that it was within the province of the State Board to assess under any theory of valuation found in such findings and decision, and that having adopted the most reasonable and proper theory, and assessed appellant's property at less than 75 per cent of such value, that the appellant can not complain.

The assessment of other property in Shoshone County was upon approximately the same proportion of its full cash value as that upon which appellant's property was assessed.

During the year 1918 the total assessed value of all property in Shoshone County was $31,828,640. (Bk. of Ex. p. 373).

Of this total amount, $6,356,243.00 was the valuation placed by the State Board of Equalization upon public utilities, including railroads, telegraph and telephone companies, light and water companies, and current transmission lines such as, and including, appellant's property. No contention was made upon the trial that the utilities had been assessed at less than their full cash value. Indulging a presumption favorable to the appellant, the trial court found that public utilities were, in fact, assessed at 75 per cent of their value, the same as the appellant's property. There is no evidence in the record to indicate that such utilities, other than appellant's property, were not assessed at their full value, and certainly nothing to show that

such utilities were assessed at a lesser percentage of their value than appellant's property. The testimony of Mr Arney as to statements made by individual members of the State Board (appellant's brief pp. 33-34) clearly refers to assessments of previous years, and not to the year 1918, and is at best but the expression of the personal opinion of but one member of the board. This member, speaking of railways, stated that they were assessed at 50 per cent, and expressed the opinion that all property values should be increased. There is nothing in the record in this case to show that utilities were not valued higher by the State Board in 1918 than in previous years. Certainly the court would not, in the absence of any competent evidence, assume that this character of property was assessed at a lower percentage of value than was the appellant's. And in assuming that utilities were assessed at 75 per cent of their value, in common with appellant's property, rather than at 100 per cent of their value, as the law requires, the court indulged a presumption favorable to appellant, for it had wholly failed to prove that public utilities had not in fact been assessed at their full cash value. In truth, in its complaint the appellant never contended that utilities had been assessed for less than their full value. Its contention throughout was that the property assessed by the local assessors, and that property alone, was systematically undervalued (Comp. par. XI, Tr. p. 15). Indeed, a careful reading of the complaint will disclose the fact that the one complaint is

that the local assessors, within the scope of their authority, assessed property at only 50 per cent of its value, while the State Board of Equalization assessed appellant's property for more than 100 per cent, and without any intimation as to what percentage was used by the State Board in assessing other property within the scope of its authority. We think it may fairly be assumed, then, that the property assessed by the State Board was not valued at less than 75 per cent of its value, as found by the court.

Of the total valuation in Shoshone County $12,916,645.00 was the tax upon the net profits of mines, and $154,645.00 the tax upon the surface of lode and placer mining claims based on the price paid the government therefor, of $5.00 and $2.50 per acre, respectively. It can not be contended that a tax on the net profits of a mine, or an acreage tax on the surface thereof at a fixed sum, is a tax upon the full cash value of a mine or mining claim; it may be in excess of the real value, but is usually upon only a percentage of such value. But the statute under which this tax is levied has been upheld by the trial court, in a case in which its constitutionality was directly attacked (*Hanley v. Federal Mining & Smelting Co.*, 235 Federal, 769, 775, cited in appellant's brief), and its validity has at no time been questioned in the present suit. And we contend that unless the validity of these laws is attacked, that these assessments are as valid, so far as this suit is concerned, as if made upon full cash value. It is the conten-

tion of counsel for appellant that this net profit tax and acreage tax on mining property grants to mining property a partial exemption from taxation, and that the increased burden thrown upon other property by reason of such partial exemption should be borne by such other property ratably; and that if appellant's property was assessed at 75 per cent of its value, while other property in the county was assessed for only 50 per cent of its value, then appellant's assessment should be reduced to a 50 per cent basis. Without admitting the correctness of this contention of appellant, we insist that there is no evidence in the record upon which the court could, even if so inclined, have based a reduction in appellant's taxes in Shoshone County. Besides the property already mentioned, mining improvements, such as mills, concentrators and the machinery in same, and the like were assessed at $3,876,170, an amount equal to 100 per cent, or even more, of the real value thereof. (Test. of Herrick, Tr. p. 78). The tax on bank stock amounted to $374,103, which was required to be assessed for its full cash value, and there is nothing to dicate that it was not so assessed in Shoshone County. And the remaining property of the county, amounting to $8,150,834, or slightly over one-fourth of all the property in the county, was assessed at between 50 and 100 per cent of its real value. Stocks of merchandise were assessed at invoice price, or in some cases, where it was old, less than invoice price, but an effort was made to assess at their full cash value, irrespective of invoice price

(Tr. pp. 79, 83). Farm lands, business and residence property were assessed at from 50 to 100 per cent, or more, and considerably more was assessed over 50 per cent, than under that percentage (Tr. pp. 82, 83).

The evidence shows, then, so far as Shoshone County is concerned, that out of a total assessed value of $31,828,640, $23,677,806 was assessed at from 75 to 100 per cent of its full cash value, or under statutes the validity of which is not here questioned, and the remaining $8,150,834 was assessed at from 50 to 100 per cent, or more, of its real value. But as to this last mentioned property, the record is silent as to what amount, or what character, of property was assessed at any different percentage; it is as reasonable to assume that as to this $8,000,000 worth of property, 90 per cent was assessed at its full cash value, as it is to assume that only 10 per cent was so assessed. In other words, there is nothing in the evidence from which the court below could determine how general had been the undervaluation of the property assessed by the county assessor in Shoshone County, and, even had it been so inclined, the Court could not have made a reduction in appellant's taxes in Shoshone County which would not have been subject to the criticism that it was an arbitrary reduction, without evidence to support it And even as to the tax on the net profits of mines and the acreage tax on the surface of mining claims, there is no evidence to indicate what relation such assessments bore to the full cash value of such property; nor could there well be, for

this law has as its chief justification the fact that it is extremely difficult, if not impossible, to even approximate the real market value of a mine. And while appellant's counsel, in their brief, hazard the guess that the net profits for one year would range between 20 and 50 per cent of the full cash value, this is palpably but a mere conjecture.

This is not a case where, as in *Greene v. Louisville & I. R. Co.*, 244 U. S. 499, the great majority of all the taxable property had been assessed at one percentage of value (in that case 80 per cent of all the taxable property was assessed at 52 per cent of its value), while the complainant's property was assessed at a much higher percentage. Nor has appellant made out its case as pleaded in its complaint herein, where it alleged that more than 75 per cent of all the taxable property in Shoshone County was assessed at less than 50 per cent of its value. (Comp. par. XXIII, Tr. p. 23). Here the great majority of the property in the defendant county was assessed at as high or a higher percentage of its full cash value than was appellant's, and only a small part, and an indefinite amount, of the property was assessed at less than its full value.

Except as to the State Tax, the appellant's taxes in Shoshone County were not affected by the undervaluation of property in other counties of the State.

Our contention is that so far as this suit is concerned, Shoshone County must be dealt with as a single taxing unit. If, as found by the trial court, the valuation

of appellant's property for purposes of taxation was upon the basis of 75 per cent of its value, and if the great majority of other property in Shoshone County was assessed at the same or a higher percentage of its value, then appellant has not been called upon to pay more than its proper proportion of taxes, except insofar as its state taxes may have been increased by the undervaluation of property in other counties of the state

Appellant's taxes in Shoshone County for the year 1918 consisted of the following items:

State Tax	$1,302.06
County Tax	3,520.39
School Tax	2,641.64
School Bond Tax	74.76
City of Wallace	58.23
City of Kellogg	49.00
City of Mullan	21.00
Total Tax	$7,667.08

(Tr. p. 33).

It will be observed from this statement that this entire tax, excepting the first item, is local to Shoshone County, where we contend the appellant's property was not assessed at a higher percentage of its real value than th vast amount of the other property. If throughout the other counties of the state there was a general undervaluation of practically all property, such undervaluation would naturally tend to increase the rate of the state levy, and by reason of such increase in the rate

the appellant would be called upon to pay a higher state tax than it would if all property in the state had been assessed for say 75 per cent of its value, and the rate correspondingly decreased. But even as to this item, the appellant is placed upon the same basis exactly as other taxpayers in Shoshone County. It is only asked to pay a tax upon the same percentage of the value of its property, and at the same rate, as other property in that County.

We respectfully submit that the decision of the trial Court should be affirmed.

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